Supreme Court of the United States.

FLINT, EDDY & CO.,
Appellants,

AGAINST

GEORGE CHRISTALL AND JAMES GREIG AS TRUSTEES,
Libellants.

No. 591.
October Term,
1897.

BRIEF FOR APPELLANTS.

This action comes before the Supreme Court upon the following question certified by the Judges of the United States Circuit Court of Appeals for the Second Circuit:

> "If a vessel, seaworthy at the beginning of the "voyage, is afterwards stranded by the negligence "of her master, has the shipowner, who has exer- "cised due diligence to make his vessel in all re- "spects seaworthy, properly manned, equipped and "supplied, under the provisions of Section 3 of the "act of February 13, 1893, a right to general aver- "age contribution for sacrifices made and suffered "by him subsequent to the stranding, in successful "efforts to save vessel, freight and cargo?" (*Record*, *p.* 1).

The action is one of admiralty, and was instituted in the District Court of the United States for the Southern District of New York by the libellants, George Christall

and James Greig, as trustees, seeking contribution from the cargo in respect of certain alleged general average charges arising from the stranding of the steamer *Irrawaddy* in November, 1895, on the coast of New Jersey.

At the time of such stranding the *Irrawaddy* was bound from Trinidad to New York with a cargo which had been shipped to the appellants, Flint, Eddy & Co., and to other consignees.

By admissions upon the trial it appeared that the stranding of the steamer was due to the negligent navigation of her master, and that, up to the time of the stranding, she was properly manned, equipped and supplied, and was seaworthy.

These facts are recited in the certificate granted by the Circuit Court of Appeals (*Record, p.* 1).

The vessel was relieved from the strand by the jettison of a portion of her cargo, and through sacrifices and losses voluntarily made or incurred by the shipowner and through the services of salvors (*Record, p.* 1). The losses and sacrifices of the shipowner resulted from efforts to float the vessel by reversing her engines, whereby sand got in the machinery. Also some holes were cut in one of the bulkheads to permit the water to pass from one compartment to another (*Libel, Art.* 4; *Answer, Art.* 4).

The *Irrawaddy* completed her voyage and made delivery of her remaining cargo to the consignees in New York, upon their executing an average bond for the payment of all losses and expenses which should appear to be due from them as stated and apportioned by the adjusters "in accordance with established usages and laws in simi-" lar cases (*Record, p.* 1).

An adjustment was afterwards stated in New York which allowed, in the general average account, the compensation of the salvors, the sacrifices of cargo, and the losses and sacrifices of the shipowner.

Messrs. Flint, Eddy & Co. thereupon paid to the trustees under the average bond, the sum of $4,483.64, which was the full assessment upon their cargo in respect of the compensation of the salvors and the sacrifices of other cargo owners. They refused to pay the further sum of $508.29, charged against them in respect of sacrifices of

the shipowner (*Record, p.* 1), and the suit was instituted for the recovery of that item.

The District Court made a decree in favor of the libellants, from which decree an appeal was duly taken to the United States Circuit Court of Appeals.

Upon the appeal coming on to be heard that Court certified to this Court the above question of law, in respect of which they desire instruction.

The pleadings in the cause (*Record, pp.* 2-5) and the opinion of the District Judge (*Record, pp.* 6-12) are appended to the certificate.

POINTS.

First.

THE SHIPOWNER IS NOT ENTITLED TO CLAIM ANY ALLOWANCE IN RESPECT OF HIS ALLEGED SACRIFICES, BECAUSE OF THE FACT THAT THE STRANDING, TO RELIEVE WHICH THE SACRIFICES WERE MADE, WAS DUE TO THE FAULT AND NEGLIGENCE OF THE SHIPOWNER'S SERVANTS CHARGED WITH THE NAVIGATION OF THE STEAMER.

The primary rule may be stated that a shipowner who has, by his fault or by the fault of his servants, brought about a disaster, is not permitted to call upon the innocent sufferers in the calamity for contribution to the personal sacrifices or losses incurred or made by him to relieve the vessel and her cargo.

There is no question as to the existence of this rule; though there may be differences as to the reason for the rule.

(**a**.) Under one view it may be said that the sacrifices or losses of the shipowner are *not general average*.

(**b**.) Again, it may be said that the sacrifices *are* general average, but that the shipowner has forfeited his right to contribution by reason of his fault.

(c.) Under still another view it may be said that the sacrifices are general average, but that contribution may not be enforced by the shipowner, because he would be required ultimately to make good those same contributions to the persons from whom they were taken, under his obligation to respond in damages for negligent navigation.

This latter view rests practically upon a theory of the application of offsets.

The libellants contend that they are not bound by any rule which, for whatever reason, forbids them to seek contribution.

In making this contention they claim that the applicability of the rule is defeated by the fact that the ordinary contract of carriage has been limited by specific conditions. They point out that the shipowner has performed his obligations under the Harter Act, and it is admitted by the appellants that the owner of the *Irrawaddy* did in fact exercise due diligence to make his vessel seaworthy when she started on her voyage and that he maintained her in such condition up to the time of the stranding.

The Harter Act by its terms exempts the shipowner only from responsibility "for damage or loss resulting "from faults or errors in navigation."

The libellants claim, however, that the influence of the Act extends further, and that by necessary implication it authorizes the libellants, as trustees, to recover for the benefit of the owner of the *Irrawaddy* contributions from the cargo in respect of his alleged sacrifices.

The argument is that the shipowner, being exempt from responsibility for damage resulting from the faulty navigation of the master, is discharged not only in respect of physical injury to the goods, but also in respect of claims based upon general average contributions paid by the owners of cargo; and that, the shipowner being exempt from this latter class of claims, the rule which would debar him from seeking contribution in respect of his own sacrifices is no longer supported by reason.

I.—In considering this argument it becomes at once pertinent to seek the true reason why a shipowner, through whose legal fault disaster has arisen, has been debarred from seeking contribution in respect of his sacrifices.

The learned District Judge held:

> "There is no doubt, I think, that the liability to "indemnify the cargo owner is the *sole ground* "of the exclusion of the shipowner's claim to gen- "eral average compensation for his expenses in "rescuing the adventure from a peril caused by "bad navigation" (*Opinion, Record, p.* 8).

Starting with this premise he naturally and, indeed, quite inevitably, found that—

> "It therefore seems necessarily to follow that "in cases where all such liability is abolished by law, "as it is under the circumstances of this case by "the Harter Act, no such exclusion can be justi- "fied; and that where no such liability exists on "the part of the ship or her owner, his right to a "general average contribution from the cargo "arises necessarily by the same principles of equit- "able right that apply in ordinary cases of general "average" (*Record, p.* 8).

If the District Judge has erred in his premise that the liability of the shipowner to indemnify the cargo owner has been the "sole ground" for the exclusion of his claim to general average compensation in respect of his losses, the foundation of his opinion is gone, and his decision crumbles.

We very respectfully submit that he has erred upon this crucial question.

There is no unanimity among foreign nations as to the reason of the rule excluding the shipowner from the right to contribution. The question in each nation is generally determined by its code. Its code is, we may assume, the

outgrowth of its general law and indicates ordinarily the conclusions of its writers and of its Courts.

The following citations from European codes are, with few exceptions, taken from the appendix of Lowndes on Average, 4th Edition, 1888; and the translations of the author have been adopted, the purpose being merely to illustrate generally the status of the question among commercial nations at a stated time.

Neither the code of a foreign country nor the decisions of its Court are controlling here. The statute law or the judicial law of some of these countries may have been modified since Mr. Lowndes' work was published, but such circumstance, if it exists, does not affect our argument.

Our point is that the origin of the rule excluding the shipowner from contribution in respect of his losses does not support the premise upon which the learned Judge founds his decision.

ITALY:

Art. 643: "General average are extraordinary ex- "penses incurred and the damages voluntarily sustained "for the good and for the common safety of ship and "cargo. * * *

"*Not considered general average*, though incurred vol- "untarily for the common good and safety, are damage "suffered or expenses incurred by the ship when they "were occasioned by the defect or old age of the ship, or "by the fault or neglect of the captain or crew."

Code of Commerce, Title 7, *Chap.* 1; *Lowndes*, 439, 444.

HOLLAND:

Sec. 700: "When the inherent defect of the ship, her "unfitness to perform the voyage, or the fault or neglect "of the captain or crew has occasioned the damage or "expense, such damage or expense, although incurred "purposely, after due deliberation, and for the common "benefit of the ship and cargo, *is not general average.*"

Code, Book 2, *Chap.* II; *Lowndes*, 466-468.

GERMANY:

Art. 702: "All damage intentionally done to ship or "cargo, or both, by the master or by his orders, for the

" purpose of rescuing both from a common danger, " together with any further damage caused by such " measures, and also expenses incurred for the same pur- " pose, are general average."

Art. 704: " The application of the rules for general " average is not debarred by the fact that the danger has " been brought on through the fault of a third party, or " even of one of the parties interested.

" The party interested who is in fault, however, not " only can demand no compensation for any damage he " may himself have sustained, but is likewise answerable " to each contributor for the loss which the latter has " been put to through having to contribute, as general " average, to that damage."

Code of Commerce, Title 8, *Chap.* 1, *Arts.* 702, 704; *Lowndes*, 400, 401.

SWEDEN:

Sec. 122: " General average shall be admitted, although " the peril by which it has been occasioned may have been " caused by the master, owner, or goods proprietor, or the " act of which general average has been the consequence " may have been undertaken by the master without suffi- " cient motive; but an action for damages shall lie against " the party causing the average, and the average com- " pensation to which such party might otherwise have " been entitled shall be forfeited."

Scandinavian Code, *Lowndes*, 489.

FRANCE:

Sec. 400: " To general average belong, * * * and, " in general, damage voluntarily sustained and expenses " incurred after express deliberation, for the common " good and safety of the ship and cargo, from their load- " ing and departure to their arrival and discharge."

Sec. 405: " Damage done to the merchandise in conse- " quence of the master's having neglected to close the " hatches, to make the ship properly fast, or to provide " proper implements for hoisting; and *all other misfor- " tunes caused by carelessness of the master or crew, are " particular average*, for which the shipper has his re- " course on the master, the ship and the freight."

Code de Commerce, Title 11, *Secs.* 400, 405; *Lowndes*, 362–364, 366.

In explanation of the French Code, M. de Courcy, the president, and M. Sorel, the secretary of the Comite des Assureurs Maritimes de Paris, responded to certain inquiries of Mr. Lowndes as follows:

"Q. *Can there be a general average* when the danger "has arisen from unseaworthiness, the *fault of the cap-* "*tain*, or *vice propre* of the cargo?

"A. *No.* The expenses of putting into a port of refuge "in that case are chargeable against the party who has "occasioned it; and that party is also liable to an action "for damages on the part of those who have suffered loss "through the fault or the *vice propre*."

Lowndes on Average, 4th Ed., 379, *and the French cases cited.*

The French cases cited by the learned District Judge are scarcely pertinent to the discussion, and certainly are not in point to support the claim put forward on behalf of the owner of the *Irrawaddy*.

The case of *L'Amerique* (*Dalloz's Rep.*, 1878, 1, 479; *Sirey, Lois et Arrêts* 1878, 1, 292), related to the obligation of a cargo-owner to pay his proportionate share of the compensation of salvors, an obligation which has been recognized by Flint, Eddy & Co., who have paid voluntarily all charges incident to salvage and all charges arising from the losses and sacrifices of other cargo-owners, stopping only at the contribution claimed by the shipowner in respect of his own alleged losses and sacrifices.

So also the case of the *Alexander Lawrence* (10 *Rev. Int. du Droit Maritime*, 147) is in no closer accord. In that case fire occurred at sea through the negligence of the crew, and the vessel prudently sought a port of refuge. It was held that the exemption clauses of the charter did not suffice to relieve the shipowner from liability for the physical injury sustained by the cargo, and for such damage the steamer was condemned. It was further held that the terms of the charter did suffice to relieve the shipowner from sole responsibility for the expenses of the port of refuge, and that such expenses should be dis-

tributed as general average charges. The language of the Court is:

"Si en effet les dommages qui sont la conséquence d'une faute du capitaine ou de l'équipage sont en principe avaries particulières, l'armateur s'était dans l'espece exoneré de la responsibilité de ces sortes de fautes par une clause de la charte-partie dont l'arrêt attaqué a proclamé lui-même la validité et à laquelle il a donné effet."

"If, in fact, the damages which have resulted from a fault of the master or crew are in principle particular average, the shipowner was in this particular case exonerated from responsibility from such classes of faults by a clause of the charter-party which the judgment appealed from has itself declared valid, and to which it has given effect."

The particular phrase of the charter-party which worked the peculiar result appears to have been "*non garantie d'avaries.*" The shipowner, through the fault of his captain, was required to pay for the physical damage to the goods, but under the specific clause of the charter-party was enabled to collect the port of refuge expenses as general average charges.

Neither *L'Amerique* nor the *Alexander Lawrence* dispute or question the principle stated by M. de Courcy and M. Sorel (*supra, p.* 8).

NORWAY:

Sec. 72: "Even if the captain or crew have committed a fault for which they are responsible, the owner of the ship is not on that account deprived of his right to demand general average. In this, as in other cases, the penalty or damages that may be recovered from the captain or seamen is to be deducted from the sum apportioned as general average."

Lowndes, 501.

DENMARK:

The early law as set forth in the royal charter granted in 1850 to the Copenhagen Sea Assurance Company, provided by Section 29:

"If the cause of peril is attributable to the owner of the ship or to the misconduct of the master, the ship-

" owner *forfeits* his right to have his loss made good in " general average; the same rule refers to the owner of " the cargo under similar circumstances."

The later law and, as we understand, the existing law provides:

Sec. 192: "A distribution of damages in general aver- " age may take place although the danger which has " caused the losses may have arisen from somebody's " fault, but the guilty gets no compensation for damage " caused by himself. If the danger has been caused by " any fault or neglect for which the owner is responsible " under Section 10 he receives no compensation for the " damage which he sustains.

"If the captain, or whoever is acting for him, errs in " judgment with regard to the nature of the danger or the " choice of measures to avert it, the damage must then be " apportioned in general average, but the owner, unless " the measures which were taken can be regarded as ex- " cusable under the circumstances, loses any right to com- " pensation for damage which he has caused.

"He who thus *forfeits* a right to compensation, or is " compelled to contribute to the average, may make claim " against whoever is legally responsible for the damage."

Chapter 7; *Lowndes*, 527.

RUSSIA:

Sec. 1087: "If the captain has overcharged his vessel " beyond the load-water line: and if, in case of danger, " to save or lighten the vessel, he throws overboard a por- " tion or the whole of the merchandise, the goods thus " thrown overboard *are not considered as averages*, but " the captain and shipowner should pay the entire loss."

Lowndes, 548.

PORTUGAL:

Sec. 1817: " The following, though done voluntarily and " after deliberation for the good of ship and cargo, *shall* " *not be deemed general average;* expenses occasioned by " the inherent defect of the ship, by her unseaworthi- " ness, or by the fault or neglect of the captain or any " of the crew. All these are at the charge of the captain " or the ship."

Lowndes, 585.

SPAIN:

Sec. 810. "The owner of the thing that has caused the "expense or sustained the damage must bear the par- "ticular average."

Lowndes, 556.

ENGLAND:

In respect of the law of England Mr. Lowndes says:

"The broad principle may be laid down, then, that no "one can make a claim for general average contribution "if the danger, to avert which the sacrifice was made, "has arisen from the fault of the claimant, or some one "for whose acts the claimant has made himself, or is "made by law, responsible towards the co-contributors."

Lowndes on Average 4th Ed., 34.

He bases this rule upon the argument that the ship-owner engages with the shipper to furnish a seaworthy ship and to navigate her with care. If she falls into distress through unseaworthiness or through fault in navigation, the owner is bound by his contract of carriage to save the goods and to pay any damage done to them. If, therefore, he sacrifices his masts or his sails, or incurs expenses, he does so for his own good, and not for the general good.

Some relaxation of this rule is indicated by recent English decisions, the relaxation being induced by the special contracts of carriage affecting the cargo. In the case of *Strang* vs. *Scott*, decided by the House of Lords in 1889, the owner of jettisoned cargo sought contribution from ship and other cargo. Their Lordships declined to consider whether the rule of contribution in cases of jettison had its origin in an implied contract to contribute by those interested (*Wright* vs. *Marwood*, 7 *Q. B. D.*, 67), or whether it came from the old Rhodian laws, "not as a matter of contract, but in consequence of a "common danger, when natural justice requires that all "shall contribute for the loss of property which is sacri- "ficed by one" (*Burton* vs. *English*, 12 *Q. B. D.*, 20).

They did find that the vessel, the *Abington*, had fallen into distress through the faulty navigation of her master, and then, speaking by Lord WATSON, said:

"The fault of the master being matter of admission, it "seems clear upon authority that no contribution can be "recovered by the owners of the *Abington*, unless the "conditions ordinarily existing between the parties stand- "ing in that relation have been varied by special con- "tract between them and their shippers. But the negli- "gent navigation of the master cannot, in the opinion "of their Lordships, afford any pretext for depriving "those shippers whose goods were jettisoned of their "claim for general average contribution. They were not "privy to the master's fault, and were under no duty, "legal or moral, to make a gratuitous sacrifice of their "goods for the sake of others in order to avert the con- "sequences of his fault. The Rhodian law, which in that "respect is the law of England, bases the right of contri- "bution not upon the causes of the danger to the ship "and cargo, but upon its actual presence, and such ex- "ceptions as that recognized in *Schloss* vs. *Heriot* are in "truth limitations on the rule, which have been intro- "duced from equitable considerations in the case of actual "wrongdoers; or of those who are legally responsible for "them. The owners of goods thrown overboard having "been innocent of exposing the *Abington* and her cargo "to the sea peril which necessitated jettison, their equit- "able claim to be indemnified for the loss of their goods "is just as strong as if the peril had been wholly due to "the action of the winds and waves."

Strang vs. *Scott*, *L. R.*, 14 *App. Cas.*, 601, 609, 610.

Their Lordships declined to say what the effect would be upon claims advanced by a shipowner of clauses in the bill of lading exempting him from responsibility for the negligence of the navigators, there being no proof that all the *Abington's* bills of lading contained such clauses, and they added:

"But this is not a suit for recovery of contribution, and "the appellants, if it be necessary, will not be precluded "from substantiating their averments in the adjustment "of average claims" (*p.* 611).

A year later Sir JAMES HANNEN, President of the Probate Division, held that a shipowner might claim contribution in general average for sacrifices incurred in relieving a vessel and her cargo from

the consequences of negligent navigation when the shipowner was relieved by apt clauses in the bills of lading from responsibility for such negligence. His opinion is brief, and is expressly based on Lord WATSON'S suggestion in *Strang* v. *Scott*, that the rule forbidding the shipowner to seek contribution may be modified when the ordinary conditions between cargo and shipowner have been changed by express contract. He quotes this suggestion, and adds:

"Here it appears to me that the relation of the goods-
" owner to the shipowner has been altered by the con-
" tract; that the shipowner was not to be responsible for
" the negligence of his servants in the events which have
" happened. I, therefore, give judgment on the claim for
" general average."

The Carron Park, L. R. 15, *Prob. Div.*, 403.

The opinion of Sir JAMES HANNEN is peculiarly unsatisfactory, for the reason that he relies exclusively upon Lord WATSON'S dictum, while Lord WATSON, in the very case in which he delivered the dictum, held that the effect of a negligence clause in a bill of lading as affecting the shipowner's right to contribution was not before him in the case, and would not be passed upon.

The same question was referred to by Sir GORELL BARNES in 1893, but again collaterally.

The Mary Thomas, L. R., 1 *Prob. Div.* (1894), 108.

In that opinion the state of the law in Holland denying general average contributions to the owner of a vessel which has through negligence met disaster, even when the bills of lading contained the negligence clause, was recognized (*pp.* 113, 114, 116).

An earlier English case, and a better reasoned one than the *Carron Park*, denies to the shipowner the right to seek contribution. The steamer *Ettrick* in May, 1880, met with collision and was sunk. Her owner at once instituted an action to limit his liability, admitting in the action that the collision was due to the bad navigation of the *Ettrick*. He paid into court the £8 a ton which is the limitation fixed by the statutes of Great Britain. The *Ettrick* and

her cargo were then raised by the Conservators of the Thames. The expenses thereby incurred were paid by the shipowner, and the cargo was delivered to its owners under usual general average bonds. An adjustment being prepared, the shipowner brought suit against one of the consignees of cargo for contribution to these expenses. A special case was thereupon stated for the opinion of the Court, and questions were submitted whether the shipowner was entitled to any, or what, sum by way of general average contribution, salvage or otherwise, either against the cargo or the cargo owner or the fund in court. The Court of Appeal held unanimously that the shipowner could not have any relief, overruling expressly the contention of his counsel that, having paid into court his £8 per ton, he was purged of his liability as a wrongdoer and stood in the position of an innocent party.

The Ettrick, *L. R.*, 6 *Pro. Div.*, 127.

II.—In considering the possible effect of the Harter Act upon the libellants' claim for contribution, it is important to first ascertain what has been the true reason in the United States for denying to a shipowner contribution to sacrifices following a disaster arising from his servants' negligence. With Holland, Portugal, Italy and Russia holding unequivocally that such expenses are *not general average;* with France and Spain apparently relegating them to the column of particular average; with Germany and Sweden holding that the application of the ordinary rules of general average is not suspended by the negligence of any of the parties interested; with Denmark and the new Scandinavian code holding that negligence works a forfeiture of the shipowner's rights; with England alone holding through her courts, and with some uncertainty, that a shipowner is debarred from seeking contributions only because he would subsequently be required to pay them back, we come to the reason for the rule in the United States.

THE UNITED STATES:

We cannot find that it has been heretofore essential to the consideration of any case to determine accurately the

reason for the rule in this country, and there is, therefore, naturally found some looseness among writers and in judicial decisions.

We submit, however, that the soundest conclusion is that the subsequent sacrifices of a party whose negligent action, either personal or through his servants, has induced the peril are not general average. Neither equity nor natural justice suggests that contributions in respect of such sacrifices should be made by those who have been innocently involved in the disaster.

Mr. Parsons denies the right of contribution in respect of a jettisoned deck load on the ground that goods ought not to be carried on deck, saying: "If, then, being car-" ried there, they are jettisoned to save the ship and cargo " from impending peril, this loss gives no claim for con-" tribution." If the goods were improperly on deck, he imposes responsibility for the destruction of the goods upon the shipowner.

Parsons on Shipping, Vol. 1, *pp.* 353, 357.

Again he holds (*p.* 411) that

" where a jettison is justified by the circumstances under " which it takes place, and these circumstances were " caused by the fault of the master or by his want of care " or skill, the jettison would give no claim for contribu-" tion."

He reaches the same conclusion respecting sacrifices attributable to the original unseaworthiness of the vessel.

Parsons on Shipping, Vol. 1., *p.* 411.

He simply holds that such losses are not general average. He does not deny contribution upon any theory of offsets or accounts.

Mr. Gourlie says:

" If the necessity for the general average act arises from " the unseaworthiness of the vessel, the *vice propre* of the " cargo or the negligence or barratry of the master or " crew, no contribution generally would be due. If the " danger and the necessary sacrifices are produced by the " fault of the vessel or captain—and the vessel appears as " a claimant for contribution—it would seem a proper

" answer that he by whose neglect the loss had been pro-
" duced should bear it without relief."

Gourlie on General Average, 15. *See also the cases cited.*

The position taken by this author is purely equitable.

Mr. Lowndes accepts Mr. Gourlie's statement as embodying the law of the United States.

Lowndes on Average, 4th Ed., Appendix O, p. 608.

It has been adopted, also, by Judge BROWN, in the Eastern District of Michigan.

The Ontario, 37 *Fed. Rep.*, 222.

The District Judge for the Southern District of New York in 1889 intimated that the foundation of the rule might be one of offset, but did not express a conclusion upon that point; nor was a conclusion necessary for a decision of the case.

Ralli vs. *Troop*, 37 *Fed. Rep.*, 888, 890.

At that time the seed was apparently planted in his mind, which finally bore fruit in the decree now under appeal.

In the case of *The Schiedam*, the same Court again referred to the question incidentally, dismissing the claim of the shipowner, however, upon the ground that the sacrifice was not contemplated and not voluntary.

Van den Toorn vs. *Leeming*, 70 *Fed. Rep.*, 251.

In the *City of Para* the same Court sustained a claim for contribution among cargo owners, although the stranding out of which the sacrifice arose was negligent, apparently upon the authority of *Strang* vs *Scott*. There was no claim of the shipowners directly involved, nor any question of their exemption from liability.

Pacific Mail S. S. Co. vs. *N. Y. H. & R. Mining Co.*, 69 *Fed. Rep.*, 414.

The Circuit Court of Appeals, in that case, sustained, " upon the ground of equitable right," the claims of cargo

owners *inter sese* for contribution in general average, placing the decision expressly upon the authority of *Strang* vs. *Scott*.

Pacific Mail S. S. Co. vs. *N. Y. H. & R. Mining Co.*, 74 *Fed. Rep*, 564, 567.

They say, however:

"It is true that the owner of the vessel cannot claim "contribution, and is liable, also, for indemnity to the "cargo which has been sacrificed" (*p.* 567).

The Supreme Court has held strictly to the rule charging upon the shipowner the losses resulting from an unjustifiable sacrfice or a sacrifice rendered necessary by earlier negligence.

Lawrence vs. *Minturn*, 17 *How.*, 392.
Dupont vs. *Vance*, 19 *How.*, 162, 166.
The Portsmouth, 9 *Wall.*, 682.
Ralli vs. *Troop*, 157 *U. S.*, 386.

III.—Is the rule changed by the operation of the Harter Act?

The authority upon which the libellants rely to support such change is the decision in the English case of the *Carron Park*, a decision not based upon any disclosed line of reasoning—a decision based, moreover, upon a *voluntary* and *valid* agreement in respect of the carriage of goods between the shipper and shipowner, relieving the shipowner from the consequences of his servants' negligence, and not affected by the Harter Act in any way.

Assuming for the moment that the decision in the case of the *Carron Park* was sound upon the circumstances of that case, does the exemption given to the shipowner by the Harter Act effect the same result as did a voluntary and valid agreement in the bill of lading made by the shipper relieving the ship owner from his servants' negligence? The statute is one exempting shipowners from certain responsibilities to shippers which had theretofore rested upon them, and it should be strictly construed. It limits and varies the pol-

icy of the national law as declared by the Courts. By its terms it relieves the shipowner from responsibility for "damage or loss resulting from faults or errors in naviga- "tion," and THAT IS AS FAR AS IT GOES. It does not declare that the shipowner himself shall have a right to recover contribution for sacrifices or expenses incurred by him after the occurrence of the disaster for the purpose of completing his contract of transportation.

It affects only the contract for transportation. It does not effect, or purport to effect, the relation of ship and cargo under the law of general average.

When the *Irrawaddy* stranded it became the owner's interest and duty to relieve his vessel and her cargo from the position of danger, and to do everything possible to effect, not merely the safety of the cargo, but its transportation to destination.

The Portsmouth, 9 *Wall.*, 682, 687.

For expenses so incurred he has, under the primary law of general average, no right to seek contribution; and, no such right being given to him explicitly by the terms of the Harter Act, he cannot enforce such contribution upon the ground that he has been exempted by the statute from responsibility to his cargo for its physical damages.

The difference between the law of Great Britain and that of the United States in the matter of the shipowner's obligation to repair and refit his vessel and to forward the cargo to destination (*Atwood* vs. *Sellar*, *L. R.*, *Q. B. D.*, 342, 358, 359) affords of itself sufficient ground to distinguish the present case from such authority as *The Carron Park* presents.

While the question of the influence of the Harter Act upon the shipowner's claim for contributions has not heretofore been before the courts of the United States for adjudication, it has been considered by ex-Judge CHOATE, sitting as arbitrator respecting disputes arising under a general average adjustment of the steamer *Glendower*.

Fire broke out in the bunkers of the *Glendower* May 30, 1894, while she was lying at New Orleans loading cargo for an outward voyage. Water was applied and

the fire was extinguished. The cargo was necessarily discharged, but the coals were retained on board. From time to time thereafter fire again appeared in the bunkers, so that on June 20th surveyors recommended that the bunker coals be discharged and new coals supplied. The coals in which the fire had appeared were of a character liable to spontaneous combustion when confined in a damp and hot place. In an adjustment certain losses incident to holding the coals in the bunkers and to finally discharging and selling them were objected to, and as to those items the arbitration was made. The cargo which had been taken on board was unloaded on June 4th, and was subsequently forwarded by other vessels, the voyage of the *Glendower* being broken up. There was a question whether the master was negligent in not immediately discharging the coals when the fire first broke out. It was contended on the part of the steamer that it was immaterial whether or not the master was negligent, as the provisions of the Harter Act relieved the shipowner from liability, and consequently entitled him to claim contributions.

Judge CHOATE held, however, that the Harter Act had no application in the administration of the law of general average, and that the question of the master's negligence must be determined as a fact. He said:

"In the next place, was the subsequent loss attributable to the negligence of the master or shipowner?

"I assume that, if it were, the ship could not recover contribution against the cargo, and this without any regard to the provisions of the Harter Act. The doctrine of general average does not rest upon the contract of affreightment or the question whether as between the ship and the cargo there can be a recovery under that contract. There may be an exemption from the liability either under the contract or by force of statute, and this will not prevent the cargo from maintaining its general average claim against the ship (*Heye* vs. *North German Lloyd*, 33 *Fed. Rep.*, 60; s. c., 36 *Fed. Rep.*, 705; *Schmidt* vs. *Royal Mail Co.*, 45 *L. J. Q. B.*], 646).

"Besides, the present is not a question whether the ship shall contribute its share of the loss of cargo, but whether the cargo should contribute its share to a loss by the ship, and the Harter Act has no relation whatsoever to such question."

The shipowner's claim was sustained, therefore, not because of the operation of the Harter Act, but because upon the proofs the master was free from negligence.

V.—The owner of the *Irrawaddy* seeks on a broader scale the relief which was denied to the owner of the *Ettrick* in the English courts (*L. R.*, 6 *Pro. Div.*, 123).

The owner of the *Ettrick* argued that, because his liability to cargo was limited to £8 per ton, he, having met that liability by depositing the amount in court, was free to seek contribution in respect of the losses and expenses incurred by him of a general average character.

The owner of the *Irrawaddy* practically says that, because he is freed from liability to pay to the cargo owner any damages resulting from the negligent navigation of his vessel, he is logically entitled to claim from the cargo owner contribution in respect of his personal sacrifices.

Lord Jessel said:

"The ground upon which the shipowner puts his claim "is this: he says that the payment of £8 per ton not only "prevents his being answerable in damages for any more, "but is equivalent to saying that he shall be in exactly "the same position as if no negligence had been com- "mitted, and nothing had been done by him or by his "agents that would give rise to any liability. But I can- "not read the act so. All that it says is that he shall not "be answerable in damages for any greater amount. It "does not make his acts right if they were previously "wrongful. It does not give him any new rights as far "as I can see, and it appears to me that if the owner of "a vessel and cargo, which by the default of him or his "agent had been sunk in collision, after paying £8, had "raised the vessel and cargo (and it was not a case where "£8 a ton was more than the damage done to the cargo), "he would not have any right to the whole of the cargo, "or that having raised the vessel for his own benefit, if "he or his agent had been the cause of sinking the vessel, "he would thereby be entitled to salvage on the cargo, or "to general average, or to anything in the nature of "general average. It seems to me he would have no such "right, for the statute does not destroy the effect of all "that had been done, as it simply diminishes or limits "the liability in damages. If that is so, of course there "is an end of the case."

The Ettrick, *L. R.*, 6 *Pro. Div.*, 127, 133.

The claims of the two shipowners are alike in spirit and in logic; but just as the Court of Appeal in England held that the Act of Parliament limiting the liability of the owner to £8 per ton gave the shipowner no other rights, so, we submit, our courts should hold that the Harter Act is to be construed strictly and that it gives to the shipowner nothing beyond the generous measure of relief explicitly vouchsafed.

While there has been no direct authoritative adjudication in this country as to the effect of the Harter Act upon a shipowner's claim for contribution, the counter proposition that a shipowner is relieved by the Harter Act from the payment of general average contributions due to the cargo has been expressly met and overthrown.

The Roanoke, 59 *Fed. Rep.*, 161.

The Court, in determining the effect of the Harter Act, limited it purely to the contract of transportation.

Distinction was drawn between the law regulating the contract of carriage and the law regulating the distribution of general average charges.

The Court said:

"This general average contribution is not dependent "upon contract, but is 'built upon the plainest principles "'of justice' (3 *Kent Comm.*, 233), and is aside from con- "tract (*The Eagle*, 8 *Wall.*, 23). 'It is the safety of the "'property and not of the voyage which constitutes the "'true foundation of general average' (*Insurance Co.* v. "*Ashby*, 13 *Pet.*, 331). The vessel is made to contribute, "as well as the cargo saved, not because of its undertak- "ing to carry, or out of any duty as carrier, but because "it had encountered peril, and had been saved to the "owners by a sacrifice of other property.

"It therefore appears that the adoption of this statute, "which is now invoked to relieve the vessel from contri- "bution, found in force these well-known rules in no re- "spect dependent upon each other and of separate origin— "the one from the common law and the other from the "maritime law. That from the common law was harsh, "imposing upon the contract of carriage an absolute in- "surance against loss by fire, and clearly within the leg- "islative view for relief; the other, for general average, "was an ancient rule of the highest equity, not touching "that contract, but applicable only to an emergency of

"great peril to the whole adventure—a rule of mutual "benefit and value, protecting vessel and cargo when peril "arose. The statute makes no mention of general aver- "age. The legislative intent was clear to relieve the carrier "from the onerous contract liability for the encouragement "of vessel interests, and that intent furnishes the key to "the meaning of the statute, unless its language is so "broad and unmistakable that it cannot be limited to that "purpose."

The Roanoke, 59 *Fed. Rep.*, 163, 164.

The reach of the Harter Act has been defined in two other cases, and in both decisions the effect of the act has been confined strictly to the contract of carriage between the owner of the cargo and the carrying vessel.

The Delaware, 161 *U. S.*, 459, 470.
The Niagara, 77 *Fed. Rep.*, 329, 334.

In the first of these cases it was held that the act did not affect the respective rights and liabilities of the owners of two colliding vessels.

In the second case, which arose from a collision due to the mutual fault of the *Niagara* and the *William Hales*, it was held that the measure of responsibility of a colliding vessel to the owners of the carrying vessel and its cargo was not in the aggregate diminished, although the Harter Act would effect, as between the carrying vessel and its cargo, a modification in the previous rules of distribution of the recovery.

Second.

THE QUESTION CERTIFIED BY THE UNITED STATES CIRCUIT COURT OF APPEALS TO THIS COURT SHOULD BE ANSWERED IN THE NEGATIVE.

BUTLER, NOTMAN, JOLINE & MYNDERSE,
Proctors for Appellants.

WILHELMUS MYNDERSE,
Advocate.

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 591.

FLINT, EDDY & COMPANY.
Appellants.

against

GEORGE CRISTALL and JAMES GREIG,
as Trustees.
Appellees.

On a certificate from the United States Circuit Court of Appeals for the Second Circuit.

STATEMENT OF FACTS AND QUESTION.

These sufficiently appear in the very concise statement contained in the certificate, as follows:

A decree in favor of the libellants for $636.70, for general average contribution, interest and costs, having been made by the District Court of the United States for the Southern District of New York, and an appeal having been taken therefrom to this Court, and the cause having come on for hearing, a question of law arose concerning which this Court desires instructions of the Supreme Court of the United States for

its decision. The facts out of which the question arose are as follows:

On November 9, 1895, the British steamship Irrawaddy, upon a voyage from Trinidad to New York, with cargo, stranded on the coast of New Jersey through the negligent navigation of her master. Up to the time of stranding she was properly manned, equipped and supplied and was seaworthy.

The vessel was relieved from the strand November 20th as the result of sacrifices by jettison of a portion of her cargo, and of sacrifices and losses voluntarily made or incurred by the ship owners through the master and of the services of salvors.

The Irrawaddy then completed her voyage and made delivery of the remainder of her cargo to the consignees in New York on their executing an average bond for the payment of losses and expenses which should appear to be due from them, provided they were stated and apportioned by the adjusters "in accordance with established usages and laws in similar cases."

An adjustment was afterwards made in New York, which allowed in the general average account the compensation of the salvors, the sacrifices of cargo, and the losses and sacrifices of the ship owner.

The respondent thereupon paid $4,483.64, which was their full assessment, except the sum of $508.29 charged against them in respect of sacrifices of the ship owner, which they refused to pay.

The District Court made a decree in favor of the libellants; from which decree the respondent duly appealed to this Court.

Upon these facts the Court desires instruction upon the following question of law, namely:

If a vessel, seaworthy at the beginning of the voyage, is afterwards stranded by the negligence of her master, has the ship owner, who has exercised due diligence to make his vessel in all respects seaworthy,

properly manned, equipped and supplied, under the provisions of Section 3 of the Act of February 13th, 1895, a right to general average contribution for sacrifices made and suffered by him subsequent to the stranding, in successful efforts to save vessel, freight and cargo ?

The question upon which the opinion of this Court is thus desired, involves a consideration of the interpretation and effect to be given to the Act of Congress of February 13, 1893, commonly called "The Horton Act" (Stat. at Large, Vol. 27, chap. 105, p.), and is in short this: Does the act by *abrogating the liability* theretofore imposed by general law upon a ship and its owners for the faults of its officers and crew, *create a right* on the part of such owners, which they would not otherwise enjoy, to recover general a average contribution for a sacrifice made by the ship to rescue the common enterprise from a peril, not of the sea, but caused by the fault of the master ?

POINTS.

First Point.--The Harter Act, when interpreted according to the ordinary meaning of its language, does nothing more than to exempt the ship owner from liability to others. It gives him no *right* which he did not previously have.

1. "To be *held responsible* for damage or loss resulting from faults or errors in navigation or in the management of said vessel," etc., manifestly refers to that liability which requires a

reimbursement to others of losses sustained by them in consequence of any of the causes mentioned. The entire command of the statute is fully obeyed by a refusal to enforce any such liability.

Second Point.--The question therefore, whether the Harter Act should have an effect beyond and in addition to that indicated by the natural import of its language, depends upon the answer to be given to the question, whether, upon the approved doctrines of statutory interpretation, its language should be extended beyond the ordinary meaning of its words. This question should be answered in the negative.

1. As a pure matter of abstract right and justice, (if there be such a thing as pure abstract right and justice, that is to say, right and justice considered as something entirely apart from the well-being of society) one man should not, aside from contract, be held liable for the negligence or misconduct of his servants or agents. Every man should be charged with responsibility for his own acts, and for those alone.

2. In jurisprudence, however, such abstract right and justice have no place. The only right and justice recognized and enforced by it are determined by a reference to those standards and rules which have been built up upon the basis of the actual usages and customs of men, and upon a consideration of what is best for the interests of society. There are some of these rules, the observance of which is so necessary, under all conditions, that they are everywhere recognized among civilized societies, and it is these which represent our notions of natural equity

and justice. They are so ancient and universal, and have, consequently, become so familiar to men that they appear to have a foundation in human nature itself, and are for that reason, called *natural justice*. They are not the special creations of statutory law, but are ascertained and declared by the public authorities who exercise the judicial function.

3. Of these general rules there is none more conspicuous and all-pervading than that by which a man becomes liable for the acts or neglects of his agents and servants. He is made so liable by his *contracts*, even without express words. If one contracts to do a thing for another, any agents whom he may employ in the performance of his contract must, of course, exhibit the skill and diligence requisite to the performance of the engagement; but this form of liability for the acts of others embraces, comparatively, but a narrow region only. Its broader field of operation is where the principal is made liable to *third persons*, with whom he is under no contractual relations, under the doctrine expressed by the familiar maxim *respondeat superior*. This means that whenever one person is acting as agent or servant for another, the principal, or master, is liable for any injury caused by his acts or neglects. The guilt and wrong of the agent or servant are thus *imputed*, and become, so far as legal consequences are concerned, the guilt or wrong of the principal or master. There is hardly any rule of law more universal or more important than this. A principal cannot rid himself of this imputed fault by showing that he was careful in his selection of his agents or servants. The experience of mankind was not long in discovering that this, if allowed, would leave a poor reliance

for security against negligence, and would render the remedies of sufferers from negligence ineffective in consequence of the circumstance that the only persons against whom redress could be so sought were incapable of affording it.

4. The possible consequences of this law are very weighty. A single negligent act on the part of one person may strip another, wholly innocent of guilt, of all his property.

5. This universal rule has been, in many states, partially supplanted by what has been aptly styled a "singular legislation which permits "owners and masters to do mischief with "ships at a cheaper rate than is permitted to "other people, or with other instruments." The motive leading to this legislation appears in each instance to have been the same.

(*a.*) By ancient maritime codes, as adopted by most of the Continental nations of Europe, the owner of a ship was exempted from personal responsibility for loss occasioned by the negligent navigation or mismanagement of the officers or crew; the ship itself, however, remaining liable. The effect of this was to *limit* the risk of the ship owner. This policy was adopted in order to encourage the building and employment of ships, and was a part of the special policy of maritime states.

(*b.*) The same policy was subsequently adopted, from the same motive, in England, and carried out through the instrumentality of various statutes, limiting, though not abrogating, the responsibility of ship owners.

(*c.*) It was adopted by the United States also, for the like reason, by a statute enacted by Congress in 1851, in like manner limiting liability of ship owners, and thus the law of the United States was brought into near accordance with the rule of the Continental law.

(*d.*) The particular statute under consideration (Statutes at Large, Vol. 27, Chap. 105, Feb. 13, 1893) is, in some respects, of a similar character, but is very peculiar. As originally proposed, it would seem to have been sought for by those interested in opposing the numerous attempts made by ship owners to incorporate into bills of lading clauses relieving them from responsibility; but the movement seems to have been captured by the ship owners themselves, and made the instrumentality of securing very important additional exemptions. This was done by procuring the introduction of the third section of the act. This section provides in substance that where ship owners have used due diligence in making the ship seaworthy at the commencement of the voyage, they shall be relieved from all liability "resulting from faults or errors in navigation, or in the management of said vessel." This is a further invasion of the general rule above referred to, sought for the benefit of the same interest, and yielded to, we must infer, from the same motive with that which prompted the prior departures.

6. None of these statutory changes have in any manner abrogated, or changed, the universal *principle* resting upon broad foundations of justice, which imputes the faults and negli-

gence of an agent or servant to his principal or master. Indeed, it is never the effect of a statute to change *principles*. Principles exist in the nature of things, and are ascertained by science. It is not within the compass of legislative, or other power, to alter them. They are indestructible. Statutes may change, or abrogate, their *legal consequences*, but they cannot alter, and do not purport to alter, the principles themselves. Statutes are *commands*, and are to be obeyed to the letter, whether they are right or wrong. They may be, and often are, wholly wrong, but the circumstance that they are so is quite immaterial to courts. They are to be carried into effect none the less.

As a matter of *principle*, therefore, it is just as true now as before the statute was enacted that the fault of the master or crew in the navigation of a vessel is the fault of the ship owner. What the statute has done, and all that it has done, is to abrogate *one* of the *consequences* of that principle. It has commanded that "neither the vessel nor her owner or owners, agent or charterers shall become, or be held, liable for damage or loss resulting from faults or errors in navigation, or in the management of said vessel." This simply forbids the courts from entertaining any action, or proceeding, seeking to enforce any such responsibility, and does nothing more.

7. The principle then remaining, all its consequences remain, except so far as they are displaced by the statute. One of the consequences of the principle is that the ship owner cannot recover in general average for a sacrifice occasioned by a fault in navigation. This consequence has not been abolished by the statute. There is no language employed to that effect.

8. The foregoing observations express both the

fundamental rule of statutory construction and the reason on which it is founded. They enjoin that statutes, the effect of which is to limit the operation of the general principles of natural right and practice, that is to say, to derogate from the common law, should be strictly construed.

9. The grounds and reasons which support the view of strict construction in cases like the present, will further appear upon an inquiry concerning the guarantees we have for the correctness and utility of the general principles of the unwritten law, as compared with those furnished by statutory law.

The unwritten law is built up by the gradual contributions from age to age of the conclusions of learned courts, reached after thorough discussion by competent experts concerning what is right or wrong, expedient or inexpedient, in particular cases. The validity of each conclusion is subjected to frequent subsequent examination, and any errors which may have been committed are thereby likely to be discovered and rejected. The guarantees thus afforded that the final conclusions are in accordance with fundamental truth and justice can hardly be exceeded. In no one of the moral sciences are final conclusions subjected to so severe a test. The practical wisdom of mankind has recognized the value of a system of rules thus constituted. The great bulk of all the private transactions of men are, by common consent, regulated and governed by the principles thus established.

Statutory law, on the other hand, is a widely different thing. It is not enacted by experts, nor is it preceded by anything in the way of inquiry and examination which is to be com-

pared in thoroughness with the method pursued by the unwritten law. Moreover, it is often moulded by selfish aims and artful practices. Its inherent inferiority as a guide for the regulation of human transactions is fully confessed by the very limited extent to which it is resorted to. Legislators themselves are entirely conscious of the impolicy of substituting it to any considerable extent in place of the unwritten law.

To the courts is entrusted the function of preserving and maintaining the body of jurisprudence relative to private transactions as the best possible foundation for the administration of justice between man and man. They should never surrender any part of that body of scientific truth, except in accordance with the clear command of the legislature. It may justly be considered as the injunction of the legislature itself that its own action in changing the law should be thus strictly limited.

10. This line of reasoning has frequently received the approval of the highest authorities.

In the case of the China (7 Wall., 53), the question arose as to whether the Pilot Act of New York, which established a system of what was regarded as compulsory pilotage, relieved the vessel and its owners from the consequences of a collision occasioned by the fault of the licensed pilot. The argument on behalf of the ship owners was that the imputation to them of the fault of their servants depended upon the circumstances that they had the choosing of such servants, and, consequently, that if the choice were taken away from them, as it was by the act in question, the liability should also be taken away. There were some English decisions in accordance with this view,

but their correctness had been challenged by eminent English judges. This Court did not accept the argument thus urged in behalf of the ship. It placed the responsibility of the vessel, in such cases, upon the principle of natural right, founded upon the consideration of the necessity of securing diligence in the navigation of the vessel, and of having a party of sufficient responsibility who could be made answerable for the faults of those in charge. It refused to surrender these principles of right where the plain language of the statute did not require it. It deduced the following proposition as the result of the best authorities (p. 63).

"The statute giving immunity where a licensed pilot is employed abridges the natural right of the injured party to compensation, and is therefore to be construed strictly."

A similar question arising upon British statutes had been considered by Sir Robert Philimore in the case of the Halley (Law Rep., 1868, 2 Ad & Ecc., 3). He referred, in his opinion, to prior English decisions to the effect that the responsibility of the owner under the compulsory pilot law ceased. He did not undertake to disregard those decisions, for the case did not require it. The collision, which was the subject of consideration, took place in Belgian waters, and its consequences therefore were to be governed by Belgian law, which did not give immunity to the ship owner; but he frankly express his disapproval of the doctrine, saying:

"But the considerations of domestic policy, which have created this pecular law, are not founded on principles of universal law or natural justice. They are considerations of British policy which apply to British waters

and territory; but not to Flushing waters in which this collision took place. * * Lord Stowell's mind, furnished as it was with the principles of jurisprudence, rejected the argument for the immunity of the wrong doing vessel. * * * I will frankly say that it appears to me difficult to reconcile the claims of natural justice to the law which exempts the owner who has a licensed pilot on board from all the liabilities for injuries done by the bad navigation of the ship to the property of an innocent owner. * * * * No one acquainted with the working of this law which exempts the wrong doer from liability in this Court can be ignorant that it is fruitful of injustice."

The opinion of Lord Stowell, referred to by Sir Robt. Philimore, was delivered in the case of the Neptune the Second (1 Dodson, 467).

The obligation resting upon the courts to sustain the general principles established by jurisprudence, and, to that end, to construe with strictness any legislation which affects them, was subsequently recognized by this Court in the case of Sherlock *vs.* Alling (93 U. S., 99). This also was a case of collision when a licensed pilot was in charge, Mr. Justice Field, pronouncing the opinion of the Court, said (p. 106):

"The occasions upon which a pilot or engineer would be able to respond to any considerable amount would be exceptional. The statute of England, which exempts the owners of vessels and the vessels from liabilily for faults of pilots—pilotage there being compulsory and pilots being licensed—has not met with much commendation from the admiralty courts, and the general ten-

dency of their adjudications has been to construe the exemptions with great strictness. This course of decision is very fully stated in the exposition of the law made by Mr. Justice Swayne, in the case of The China (7 Wall, 53), where this Court declined to hold that compulsory pilotage relieved the vessel from liability. In the case of The Halley (Law Rep., 2 Adm. & Ecc., 15), decided as recently as 1867, Sir Robert Philimore strongly questioned the policy of the statute, and said that it appeared to him difficult to reconcile the claims of natural justice with the law which exempted the owner who had a licensed pilot on board from liability for the injuries done by the bad navigation of his vessel to the property of an innocent owner; and observed that no one acquainted with the working of the law could be ignorant that it was fruitful in injustice. The doctrine that the owners are responsible for the acts of their agents and employees ought not to be discarded, because the selection of a pilot by the owner is limited to those who, by the State, have been found by examination to possess the requisite knowledge of the difficulties of local navigation and the requisite skill to conduct a vessel through them."

Other authorities are to the same effect, Gale *vs.* Laurie, (5 B. & C., 156), Attorney Gen. *vs.* Cuse (3 Price, 303), The Protector (1 W. Rob., 45).

These authorities clearly point out the duties of courts in interpreting and giving effect to statutes which limit or displace the operation of fundamental principles. They are to consider the wisdom and policy of such statutes. This course implies no criticism upon the

action of the legislature. The command of that body is to be fully obeyed, but the question is: What is the extent of the command? Shall we, to whom the legislature entrusts the guardianship and preservation of the fundamental principles of right and justice, inquire whether the legislature may not possibly have intended more than it has said, or shall we, while loyally executing its commands, treat those commands as limited by the ordinary meaning of the language employed? The statement of this question suggests the proper answer to it.

Fourth Point.—The learned District Judge, in his carefully prepared opinion, reached a contrary conclusion in this wise: he assumes that the refusal of the maritime law to allow a recovery in general average by the ship owner, where the necessity for the sacrifice has been occasioned by a fault in navigation, *arises from, and is dependent upon*, the liability of the ship owner for the negligence of the master and crew, and that this liability having been taken away by the statute, whatever depends upon it must also fall. It is respectfully submitted that this reasoning is quite erroneous.

1. The fault does not lie in the drawing of the conclusion, but in the assumption upon which is based. It is true that in carrying out the command of the statute which takes away the *liability* everything wholly *dependent* upon that liability must be deemed also to fall; but the refusal to allow the ship owner to recover in the case supposed does not depend upon his

liability. That refusal and his liability alike depend upon another and the same thing, namely, that universal *principle* which imputes the fault of the servant or agent to the master or principal. The reason why the law refuses to allow the ship owner to recover, where the master or crew have been in fault, is that such a recovery would not be consistent with the principle of justice above mentioned. The law of general average gives its benefit only to those who are innocent, and equally innocent, of the fault. On principle, the ship owner is chargeable with the consequences of the disaster, and ought not to be permitted to shift any burden imposed by it from himself to those who are innocent. On principle, too, he should be compelled to reimburse the others for their entire loss. The statute has, indeed, abrogated the latter consequence of the principle, but not the former.

2. The fallacy, it is respectfully submitted, into which the learned judge has fallen is that the relieving of a person, by statute, of *one* of the consequences of guilt has rendered him *innocent*, which is by no means true.

The only safety in determining the effect of statutes which restrict the operation of general principles is to treat the principles as still remaining unaffected, and limiting the relief from their operation afforded by the statute to that called for by the language itself of the statute.

The moment we indulge the fallacy that statutes deal with *principles* and furnish a new basis upon which a new system of principle may be constructed, we encounter the risk of error. This is not the function of statutory law. If statutes operated upon principles, what would

be true as principle in England might be false in America; or what was true in Massachusetts might be false in New York. Upon such notions the law would cease to be a science. That part of the law which is built up by judicial decision rests upon right reason, and the actual usages of men and is truly scientific, and is the same everywhere. It was of this part of the law that Cicero spoke when he said: "Non alia lex Romae, alia Athenis, alia nunc, alia posthac."

3. It was evidently a consideration influencing the learned judge, that the statute would not be made consistent with itself if it were held to abrogate a responsibility of the ship owner for errors of navigation, and yet refused him the right of recovery of a general average contribution; but whether the legislation is consistent or not is no proper concern of a court. Where, indeed the language of a statute is doubtful, it may be interpreted so as to secure consistency; but this is for the reason that an interpretation which makes the legislation consistent is presumably that which the legislature intended, if it be as well justified by the language employed as another which would render its action inconsistent. But in truth, there is no inconsistency at all. In all cases where a legislature may contemplate some limition of a common law liability in order to accomplish some special end, the question may arise how far the proposed limitation should be carried. The ancient maritime law exempted the owner from all personal liability, but still left the vessel liable. Modern statutes in Great Britain and this country have effected somewhat similar limitations. Consistency did not require the legislature in either case to leave

the liability fully existing, or to abrogate it altogether, It might well, as it did, deem it the part of wisdom to relieve the ship owner of a part of his liability. The legislature proceeds upon grounds essentially arbitrary. These are the only ground upon which a legislature can proceed. The notion that it ever attempts to develop a scientific system, or that it could succeed in such an attempt, were it to make it, would be a mistaken view. If the question were deliberately put to a legislature, whether in abrogating the responsibility of the owners for errors in navigation, it would go still further and give them the right of recovery in general average, it might well be decided—and indeed best decided—that it should not proceed so far as to allow that right of recovery. It might well be said that the ship owner was sufficiently protected in relieving him from responsibility to others for losses, and that it would be wise to still leave in operation any other inducements which might lead him to the exercise of care.

4. The learned Judge in the court below deems his conclusion to be supported by the doctrine declared by Sir James Hannon in the case of The Carron Park (Law Rep. 15, Prob. Div. 403) and by some Continental authorities, although they are not unanimous, that where the owners are relieved by clauses in the bills of lading from liability for the faults of the master or crew, they may recover, a contribution in general average; and he goes so far as to say that the argument that the Harter act should be strictly construed "might have been urged *more plausibly*" as to the effect and intent of these *contractual* exemptions of the owners, (Record, p. 9). But can the learned Judge mean that *contracts* are subject to

the same rule of strict construction as statutes in derogation of common right? Surely this has never been heard before.

The rule of strict construction applies only to statutes, and, as already shown, is founded on the consideration that outside of the statute there is an existing body of *law* composed of wise and just precepts which should not be changed except in obedience to the clear and positive command of the sovereign, who can change it if he wishes. No such condition exists in the case of *contracts*, The sole office of interpretation *there* is to find out the *intent*, and to this end the meaning of words may be enlarged in any way short of perversion. It may be fairly argued that where a principal is relieved by *contract* from responsibility for the negligence of his servant, he is, *as between the parties to that contract*, made *innocent*, in all respects, of such negligence, and if so, he would have the same rights as other innocent persons. Where the owners of cargo *agree* with a ship owner that he shall be liable in no respect for the faults of the master or crew, they take upon themselves, *for a consideration*, the consequences of such faults; and they and the ship owner stand upon the same ground so far as those faults are concerned. Under such circumstances it might very properly be argued that a setting up, by the owner of cargo, of the fault of the master against a claim by the ship owner for a general average contribution was against the fair meaning of the contract.

But the case where the legislature, by an arbitrary statute in derogation of the general principles of right and *against the will* of the cargo-owner, takes away from the latter the right of recovery against the ship owner for damages sustained by the fault of the master, and this only, the case is very different. The

just rule of construction in such a case requires us to say that every right of the cargo-owner which is not plainly taken away is left.

LASTLY.—The question certified by the Court of Appeal should be answered in the negative.

JAMES C. CARTER,
Of Counsel for Appellant.